

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DAVID LIPNICKI, ET AL.,
Plaintiffs,

VS.

MERITAGE HOMES
CORPORATION, ET AL.,
Defendants.

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)
) CIVIL ACTION NO.
) 3:10-CV-605
)
)
) 9:25 A.M. TO 10:07 A.M.
) 10:24 A.M. TO 11:16 A.M.

CLOSING ARGUMENTS OF COUNSEL DURING JURY TRIAL
BEFORE THE HONORABLE GREGG COSTA
NOVEMBER 18, 2014

APPEARANCES:

FOR PLAINTIFFS:

MS. RHONDA HUNTER WILLS,
MS. GENEVIEVE ESTRADA, AND
MR. ANTHONY WILLS
Wills Law Firm, PLLC
1776 Yorktown, Suite 570
Houston, Texas 77056
(713)528-4455

MR. JOHN M. PADILLA, AND
MR. J. MOISES CEDILLOS
Padilla & Rodriguez, L.L.P.
1776 Yorktown, Suite 110
Houston, Texas 77056
(832)740-4301

FOR DEFENDANTS:

MR. SCOTT ROBERT MCLAUGHLIN,
MS. MARLENE WILLIAMS,
MS. KATHERINE SILVER, AND
MR. CHEVAZZ BROWN
Jackson Walker LLP
1401 McKinney, Suite 1900
Houston, Texas 77010
(713)752-4200

1 APPEARANCES CONTINUED:

2 **ALSO PRESENT:**

MR. DAVID LIPNICKI

3 MS. DONNA ARMSTRONG

MR. TIM GONZALEZ

4 MR. MARK HOPKINS

MR. MARK REYNOLDS, ESQ.

5 MS. LAURA GOODWIN

MR. TIM HERNDON

6 **COURT REPORTER:**

7 Heather Alcaraz, RMR, FCRR

Official Court Reporter

8 515 Rusk, Room 8004

Houston, Texas 77002

9 (713)250-5584

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25 Proceedings recorded by mechanical stenography, transcript
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I N D E X

JURY TRIAL

NOVEMBER 18, 2014	PAGE
Closing Argument by Ms. Wills	4
Closing Argument by Mr. McLaughlin	34
Rebuttal Closing Argument by Ms. Wills	62

1 THE COURT: So with that we're ready for closing
2 arguments.

3 Ms. Wills, you're going to go first. Whenever you are
4 ready, you can begin.

5 MS. WILLS: Thank you, Your Honor.

6 THE COURT: Give you a minute to set up.

7 I think what we'll do, ladies and gentlemen: After
8 Ms. Wills goes, we'll take a break -- short break and then go
9 through the rest of the closing arguments. And then, like I
10 said, we'll order lunch for you.

11 Art, did we get the order forms?

12 THE CASE MANAGER: I have them.

13 THE COURT: Okay. So during the break, you can take
14 care of that.

15 All right. Ms. Wills, whenever you're ready.

16 MS. WILLS: Thank you, Your Honor.

17 Good morning, ladies and gentlemen. Well, it's been
18 about a week, and it's been a very interesting week. And I
19 really want to thank each and every one of you for coming here
20 early every morning, sitting here patiently listening to all the
21 evidence, listening to the witnesses, carefully paying attention
22 to everything that was going on because I can tell you that this
23 case means a great deal to these three plaintiffs that we're
24 here representing.

25 This case means a great deal to Donna Armstrong, to

1 Tim Gonzalez and to David Lipnicki, and I'd like to thank you on
2 their behalf for coming here, for listening to the evidence, for
3 keeping an open mind, and for paying such close attention. We
4 thank you so much.

5 This is my opportunity to kind of summarize for you
6 the things that the evidence has shown, what we believe were the
7 really important key pieces of evidence, and to point out to you
8 some of the things that we believe, based on the Court's
9 instructions, will help guide you in making the right decisions
10 here.

11 So as Judge Costa just told you, there are -- there
12 are two basic issues, right? The first issue is: Were the
13 plaintiffs inside salespeople or were they outside salespeople?
14 And you really can't be both. You're either inside salespeople
15 or you're outside salespeople.

16 And I submit to you, based on all the evidence that
17 you've heard from the witness stand, from the deposition clips
18 that you've seen of witnesses that also testified under oath,
19 this was an inside sales position.

20 The second question that you're going to be asked is:
21 How many hours did these plaintiffs work? And the judge just
22 told you it's based on an estimation. There are no records.
23 It's not their fault that there are no records.

24 Meritage didn't keep records. They could have kept
25 records, but they didn't. So now we're left with their

1 reasonable estimation, and that's -- that's our only burden, to
2 give you a reasonable estimation of the number of hours that
3 they worked.

4 So I'd like to talk about this very first question
5 that you're going to need to answer. Were the plaintiffs inside
6 salespeople or were they outside salespeople? And I will tell
7 you that the answer to that question of this being an outside
8 salesperson job is absolutely no.

9 So the judge just went over the jury instructions with
10 you, and I just want to hit on some of the key ones. I noticed
11 you-all were paying very close attention when he read them, but
12 I just want to focus on some of the key instructions.

13 So what is the outside sales exemption? It has two
14 basic components. First, the plaintiffs have to have a primary
15 duty of making sales, and here we agree that was the their
16 primary duty, making sales. And we believe and it's our
17 position and the evidence has shown that they actually had two
18 products that they had to sell.

19 First, they had to sell the new homes, and, secondly,
20 they had to also sell the Meritage MTH mortgages. Meritage
21 required them and actually gave them an uptick on their
22 commissions if they not only sold the new house, but they also
23 sat them down and convinced them to buy a Meritage mortgage as
24 well. So that was their primary job duty.

25 Now, the second issue is whether the plaintiffs were

1 customarily and regularly engaged away from the employer's place
2 of business in performing their sales duties. So what's the
3 employer's place of business?

4 Well, as the judge just outlined, the employer's place
5 of business includes any fixed site, whether it's the
6 plaintiff's home or whether it's an office. And for purposes of
7 this case, that model home that you've heard so much about,
8 including the sales office that's within the model home, that's
9 inside sales.

10 The Houston corporate office that you've heard about
11 where they had the Monday morning meetings, they did the
12 call-a-thons and the phone solicitations and sometimes they'd
13 have realtors come there to the corporate office, that's all
14 inside sales. The time that they spent in these places, that's
15 inside sales.

16 So what does "customarily and regularly" mean? Well,
17 what does that mean? Well, the phrase "customarily and
18 regularly" means it has to be a frequency that's greater than
19 occasional. In other words, if you think it's just occasional,
20 you know, maybe they did some sales activity occasionally,
21 that's not enough. If you think it was just something that
22 happened occasionally, that's not outside sales, and that's not
23 customarily and regularly. It has to be greater than
24 occasionally.

25 Customarily and regularly includes work that is

1 normally and recurrently -- normally and recurrently performed
2 every workweek. Workweek after workweek after workweek,
3 normally and recurrently.

4 As the Court also just instructed you, when you're
5 looking at outside versus inside -- what's happening outside and
6 what's happening inside, you have to look at the amount of time.
7 Where were they spending their time? Were they spending their
8 time inside -- inside that model, inside their sales office or
9 inside the corporate office, or were they spending their time
10 outside? You've got to look at where was their time being
11 spent.

12 And then you have to also look at the relative
13 importance of anything that they did if they ever were outside.
14 Were they outside doing something important, something critical,
15 something that mattered, or were all of the important things
16 being done inside that model home sales office, inside the
17 model, in the corporate office?

18 If you believe that they're spending most of their
19 time inside, that the important things are being done inside,
20 these ladies and gentlemen are inside salespeople and the
21 outside sales exemption does not apply to them.

22 So as you get this charge and as you think about this
23 case, ask yourselves -- you heard them all testify. You heard
24 them say the word "rarely." Rarely. You heard them say that
25 they rarely did anything outside of that office.

1 They were required to be there. That's where they
2 were supposed to be. That's where they made their sales. In
3 considering customarily and regularly, ask yourself: Were any
4 outside things being done normally and recurrently workweek
5 after workweek after workweek?

6 I think the evidence is exactly the opposite. If you
7 look at what they were doing normally and recurrently, that was
8 all inside the office, inside the model, inside the retail store
9 that they were supposed to man, they were supposed to operate.
10 That's what this job is about. That's what the evidence has
11 shown.

12 And then, finally, when you're trying to decide
13 customarily and regularly, you need to weigh the amount of time.
14 Are they spending their time inside of the office, or are they
15 spending their time outside of the office? Where are they
16 spending their time?

17 You heard them testify. They're spending their time
18 in that office because that's where they were required to be.
19 That's where they had to be if they wanted to get an "up," if
20 they wanted to get any sales. They had to be inside.

21 And then, also, you need to weigh: Where are the
22 important things being done? Are the important things being
23 done inside where they have all their tools, where their model
24 is, where their showroom is, where their retail store is? Are
25 the important things being done inside the office? And if the

1 important things are being done inside, these are inside
2 salespeople and the outside sales exemption does not apply to
3 them.

4 So I'd just like to kind of remind you of some of the
5 facts as to why these people are inside salespeople because,
6 again, you can't be both. You can't be inside salespeople and
7 outside salespeople. You can only be one or the other.

8 And these people, Donna Armstrong, Tim Gonzalez and
9 David Lipnicki, they were inside salespeople. So they worked
10 inside of this beautiful model home. I know you guys are
11 probably tired of hearing about the "wow" factor and how
12 beautiful it is, but they really are stunning and they really
13 are gorgeous. And they're done that way for a reason.

14 You heard about all the psychoanalytical data that
15 goes into just selecting which model home you're going to have.
16 They actually have study groups and marketing people. They
17 spend thousands and thousands of dollars just trying to make
18 sure that they build the right model home because this model is
19 critical.

20 This is the heart of what they do. They spend 60, 70,
21 \$80,000, and that's a lot of money just to furnish and decorate
22 these models. This is the heart of what they do, and that's
23 where these people were working, and that's where they were
24 required to work. They are inside salespeople.

25 All of their tools -- and I won't go into this

1 *ad nauseam*, but you've heard repeatedly about their sales tools.
2 That's where they are, okay? You can't sell somebody a home
3 until you sit down with them and you go through your floor
4 plans, you go over the elevations, you go through the feature
5 sheets, you go through the price list, you go through the plat
6 maps.

7 After you figured out a floor plan, after you figured
8 out an elevation, after you figured out the features, then you
9 have to sit down with the plat map, figure out where you have an
10 available lot and whether or not you can even build that home on
11 that lot. And all of this, ladies and gentlemen, happens inside
12 because these are inside salespeople.

13 The lot fit analysis, which is what really has to be
14 done before you ever know if the home is actually going to fit
15 on a lot, again, all done inside, ladies and gentlemen. The
16 community information, the tax rates, all of that -- again,
17 these are tools that are inside, ladies and gentlemen.

18 And it has been unequivocal, unquestionable, all the
19 contracts -- and you can't have a sale unless it culminates in a
20 contract. You've got to have a contract. Every single contract
21 is done inside the model home sales office. Those form
22 contracts are right there on the computers. The salesperson
23 sits there with the buyer, types in the information into the
24 form on the computer.

25 They print it out right there in the sales office.

1 They sit there in the sales office. They go through the
2 contract with the buyer, and the buyer signs and executes that
3 contract right there inside the sales office. These are inside
4 salespeople.

5 I mentioned to you earlier that they had two products
6 that they were selling, and you've heard about this over the
7 last week. The second product that they had to sell was the
8 mortgage. And I don't care if Meritage wants to couch it as
9 encouraging, explaining, trying to get them to do it. Bottom
10 line is they required them, as a part of their job evaluation,
11 to sell the mortgage.

12 They required a sit-down rate. For everybody that
13 came in there to buy a new home, they had to also try to
14 convince them to buy the Meritage mortgage through MTH Lending,
15 and they would have the mortgage applications right there in the
16 sales office.

17 *(Excerpt of video deposition of Mr. Wade Thomas played*
18 *as follows)*

19 Q (BY MS. WILLS) And the time that these salespersons spent
20 encouraging, trying to get, trying to capture, trying to get
21 these folks to not just buy that new house but to buy that MTH
22 mortgage as well, that time was spent in the sales office,
23 wasn't it?

24 A Uh -- oh, first of all, you know, their responsibility was
25 to encourage, uh, and I -- I believe, for the most part, that

1 that time would be in a sales office.

2 Q Do you believe or did Meritage believe that its new home
3 salespersons were customarily and regularly selling the
4 mortgages outside of the sales office?

5 A No, ma'am.

6 Q (BY MS. WILLS) So then Meritage knew that their
7 salespersons were not customarily and regularly selling the
8 mortgages outside of the sales office?

9 A That's correct.

10 *(End of deposition excerpt.)*

11 MS. WILLS: So you -- you heard it from the vice
12 president of human resources for Meritage, out of his own mouth,
13 that Meritage knew that the mortgage work was all being done
14 inside of the sales office.

15 He was specifically asked were they customarily and
16 regularly selling mortgages outside, and his answer was
17 unequivocally no. These are inside salespeople, ladies and
18 gentlemen.

19 Now, you've heard this model home referred to as a
20 Meritage store, and you've heard evidence over the last week
21 that -- that they had to man this store, that that's where they
22 had to be because they were there to man a store. Just like if
23 they worked at Dillard's or Macy's, they had to man a store, and
24 this store had to be pristine.

25 They had to even pick up -- it was apparently

1 unacceptable if there were a couple of pieces of litter right
2 there in the flower bed as you walked in. They had to fluff
3 pillows. They had to straighten towels. This place had to be
4 pristine. It had to be perfect because this was the Meritage
5 store. This model, that's -- that's how they sold homes and
6 mortgages.

7 It was even compared to being a store by -- you saw
8 her -- Laura Goodwin, their sales trainer. She -- one of her
9 sales jolts that she sent out was, "If I worked at a department
10 store, would I be able to leave early to take care of a personal
11 matter if no one else were there to take care of my customers?"

12 This was a store, ladies and gentlemen, and Donna
13 Armstrong, Tim Gonzalez and David Lipnicki, they were working
14 inside of that store manning that store.

15 *(Excerpt of video deposition of Mr. Richard Harvey played*
16 *as follows.)*

17 A It's our model home. It's what we're using to sell homes,
18 so it needs to be pristine.

19 Q Because that's what Meritage wants to do with its model
20 homes, they want to have a showcase?

21 A Yes.

22 Q Why is that?

23 A Because that's representing our product and so it's our --
24 it's the way that we -- it's -- it's a -- a -- I guess the
25 physical vehicle we use to sell homes.

1 *(Excerpt of video deposition of Mr. Jeff Grobstein played*
2 *as follows.)*

3 Q Is it important to you as a regional vice president that if
4 you go and visit a sales office in a community that you're
5 responsible for, that the sales office and model home appear
6 neat and tidy?

7 A Yes.

8 Q Why is that important?

9 A Because it is our -- it's our store, it's our showroom.
10 It's, you know, where people come and learn about what we do.

11 *(Excerpt of video deposition of Mr. Steve Harding played as*
12 *follows.)*

13 A It's a retail store and so we would, ideally, allow our
14 prospects to come through those -- those sales offices during
15 those two days a sales associate would be off.

16 Q In other words, because it is a retail store, you need
17 someone to man the store during business hours?

18 A That would be ideal.

19 *(End of video deposition excerpts.)*

20 MS. WILLS: So, ladies and gentlemen, you heard it
21 from Rick Harvey. He's the guy that's been with Meritage 25
22 years. He's over all of Texas, not just Houston. He's over all
23 of Texas.

24 Rick Harvey, the very first man that you saw, he said,
25 "This is our store. This is what we're using to sell homes."

1 Then you heard from Jeff Grobstein, an officer of the company, a
2 regional vice president.

3 He said, "It's our store." And then you heard from
4 Steve Harding. You also heard from Steve Harding here on the
5 witness stand. He is the current Houston division president.
6 There's no question that that model is the store, and they were
7 supposed to be manning the store. This is an inside sales job.

8 We also know from the compensation agreement that they
9 were required to be present at the sales office. They had to be
10 present there for all business hours on all days.

11 They were responsible for this Meritage model, this
12 store, seven days a week, and the only way they could get two
13 days off is if they had someone to cover the store when they
14 were going to be out. This is an inside sales position that
15 required them to man this store.

16 They were also subject to being written up if they
17 were out of the store, outside of the model. You heard Bobby
18 Allen talking about he could remember the 11 people that he
19 actually counseled for being outside of the model. You heard
20 Jeanne Conger tell you, "It's a possibility. I could have
21 written somebody up for being out of the model."

22 If we look at this one disciplinary action form, this
23 salesperson is being written up and told that she has to make
24 sure the sales office is covered daily from 10:00 to 7:00 and
25 that she would have to inform them prior to being out of the

1 office for any reason. Any reason that she's out of that
2 office, she's got to give prior notice to management.

3 She's told in this formal written disciplinary action
4 form that this is a serious situation and that she has to make
5 immediate improvement. And this is a written -- you've heard
6 write-ups were done with human resources. You couldn't just
7 write somebody up.

8 You had to have human resources. It had to be
9 documented. This is a serious situation, and she's being told
10 in writing if you're going to be out for any reason, you must
11 notify management before you can be gone for any reason.

12 Here's another disciplinary action form. "Dan is
13 expected to be on time to work every day and work regular
14 business hours." This is an inside sales job. You've got to
15 show up, and you've got to work regular scheduled business
16 hours.

17 He's also told in this formal disciplinary action
18 form, "The model home must be attended at all times" -- "all
19 times during business hours. Leaving the model unattended by a
20 salesperson and unrepresentable leads to a potential loss in sales
21 and a decrease" -- "decrease in profitability for the company."

22 It's clear, ladies and gentlemen, Meritage wanted
23 their salespeople to be inside that model home sales office.
24 This is an inside sales job. All of the evidence points to this
25 being an inside sales position.

1 Now, you've heard the evidence. The plaintiffs were
2 paid on a straight commission basis. They didn't get a sale,
3 they weren't going to get a commission. And you -- you heard
4 Steve Harding say, "You know, sometimes we'd give them a draw."

5 A draw was basically a loan, which meant that Donna
6 Armstrong could sit there running the Meritage model for 55, 60,
7 70 hours a week, and at the end of that week she could actually
8 be in the hole to Meritage. She could be there for up to 70
9 hours that week, and at the end of that week, if she hasn't sold
10 anything, the only thing she might get, if she's lucky, would be
11 a loan from Meritage that she would have to pay back to Meritage
12 later.

13 That's the way the Meritage system -- their
14 compensation worked. Now, the only way -- the only way under
15 Meritage's system -- and you've heard it repeatedly. The only
16 way you could possibly get a sale was to be present in that
17 sales office. If you weren't there, you weren't going to get a
18 sale, you weren't going to get an "up."

19 So it is, frankly, preposterous and it strains
20 credibility to believe that somebody is going to be out, I don't
21 know, running around the neighborhood with a walk book and a big
22 plat map or, I don't know, maybe going by a realtor office and
23 dropping off some fliers where they're going to call the call
24 center, that they're going to be out doing those things when the
25 only way -- the only way they're going to earn a commission is

1 to be right there in the sales office.

2 Not only are they contractually required to be there,
3 not only will they be written up if they're not there, but it's
4 the only way that they're going to earn a commission. It's the
5 only way under the system that Meritage has devised.

6 In order to get a commission, you must be the person
7 right there to register traffic when it comes in, to get that
8 prospect to fill out a guest card. That's the only way that
9 you're going to get a commission. And the only evidence you've
10 heard is that those guest cards are done right there in the
11 model -- inside the model, inside sales activity.

12 Under their "up" system, there is no question that a
13 prospect is somebody who physically walks into the sales office.
14 The sales consultant that is onsite that day is the person who's
15 going to get the commission. So if you're not the person that's
16 onsite that day, you're not going to get a commission.

17 *(Excerpt of video deposition of Mr. Steve Harding played as*
18 *follows.)*

19 Q So it's really the person who's in the office that's going
20 to get the prospects, typically?

21 A What I would characterize that with is -- yes.

22 *(Excerpt of video deposition of Mr. Jeff Grobstein played*
23 *as follows.)*

24 Q Do you believe that getting an up or a prospect that walks
25 in the door, being the person to get to greet that person, do

1 you believe that that's important to a salesperson?

2 A Yes.

3 (By Ms. Wills)

4 Q Why?

5 A If you don't have an up, you don't get a sale.

6 *(End of video deposition excerpts.)*

7 MS. WILLS: If you don't have an "up," you don't get a
8 sale, and if you're not in that model home sales office, you're
9 not going to get an "up." This is an inside sales position.

10 Now, I wanted to point out something else from the
11 instructions that Judge Costa just read to you. I think it's
12 really important that you understand that in order to be exempt
13 outside sales work, you have to only look at the work that --
14 that an employee does with respect to their own outside sales,
15 their own solicitations, their own sales efforts.

16 So, for example, if they're dropping off a flier at a
17 realtor's office, if you even consider that to be important --
18 because you're supposed to weigh is this important or is this
19 not important. But -- but even if -- if you were to believe
20 that's important -- I'll tell you it didn't seem important to
21 me.

22 But if you were to do that and somehow they got stuck
23 in a box, didn't get thrown in the trash can, they're going to
24 be not trying to develop their own sales, this is for Meritage.
25 The evidence is going to show that these fliers they drop off,

1 they direct people to call who? To call this Jennifer lady, the
2 online person. And you heard Steve Harding. Now they have them
3 call the call center.

4 This isn't work that they were doing to -- if they did
5 it on a rare occasion, to promote their own sales. This was to
6 promote Meritage. And in order to be considered outside sales
7 work, it has to be something in conjunction with their own
8 sales, not something where maybe somebody else is going to get
9 the phone call or maybe somebody else is going to get the sale.
10 It has to be their own work, their own sales.

11 Which means that all that teamwork you've heard
12 about -- Meritage believes in teamwork. Hey, you got to do
13 teamwork. I don't care if you're not going to get the
14 commission. I don't care if it's not your sale. You still got
15 to pitch in and do teamwork.

16 That means customer comes in, they're not your buyer,
17 you still got to help them regardless. That means you've got to
18 do customer service even if you never even sold these people a
19 home. They're calling, you got to help them. You've got to do
20 warranty work. They're not my buyer, you still got to do
21 warranty work.

22 All those things, ladies and gentlemen, those are
23 inside sales activities. The only way they can be outside
24 exempt sales activities is if it's somehow specifically for
25 their own sales.

1 Now, you heard a lot about marketing. And I'm not
2 going to belabor this, but needless to say, this is a big
3 outfit, okay? They're pretty sophisticated. They've got the
4 realtor relationship manager or business development manager
5 people, whatever you want to call them, but those are the folks
6 that are going out actually forming the relationships with
7 realtors.

8 They're the ones taking people out to lunch. They're
9 the ones taking people to play golf. They're the ones
10 developing this relationship.

11 These people didn't even have a budget for something
12 like that -- didn't have a budget. You saw the e-mail. We're
13 not paying any money for you to do any realtor relationship
14 things.

15 No, the -- the only thing that these folks were
16 allowed to do was maybe have some donuts in their model and
17 invite some realtors to come. You know, host some events right
18 there in their model. That -- that was -- that was what they
19 did, or, you know, they -- they would interact with realtors
20 when they come in with their customers.

21 I mean, that's the best time to interact with them.
22 Here they are. They're in your model. They're in your store.
23 You can show them your product. That's when you interact with
24 them.

25 They also call them right there from the model home

1 sales office. They e-mail them right there from the model home
2 sales office. Inside sales. This is an inside sales position.

3 All of the big marketing stuff -- you saw the "wow"
4 commercial -- wow -- the billboards, the advertisements, the
5 website, the call center, the promotions, all of that, that's
6 all done by the marketing department. And what's the marketing
7 department trying to do? They're trying to drive people to go
8 to the model home sales office where that's where they're going
9 to find the salespeople.

10 Now, the plaintiffs are inside salespeople. Just to
11 summarize, they worked in a model home sales office selling new
12 homes and mortgages. They were responsible for operating the
13 store. They rarely took customers out for any reason.

14 So when you're looking at customarily and regularly,
15 it has to be more than occasional. This doesn't even rise to
16 the level of occasional. It has to be more than occasional.

17 It has to be normally and recurrently done workweek
18 after workweek after workweek. The evidence that you've seen --
19 the only evidence you've seen is that if they ever took anybody
20 anywhere, it was very rare. And if they did, I mean, I don't
21 even know that it was anything important.

22 You heard from one home buyer of Tim Gonzalez who
23 said, "Yeah. I came in. He had the one perfect home for me. I
24 knew immediately that's the home I want. I want to go see this
25 house."

1 Now, she wasn't from that area. Her realtor wasn't
2 from that area. So Tim Gonzalez took them over and showed them
3 that inventory home.

4 Now, that's one buyer, only buyer that Meritage
5 brought in here to you. Now, you heard that an average week,
6 about ten people come into a model home sales office. That's
7 average. Frankly, that's probably low. But that means that
8 over 500 buyers are going to come in a year, and you heard Tim
9 Gonzalez worked there two years.

10 So in two years he saw over a thousand prospective
11 buyers, and they provided you with one person out of over a
12 thousand where he took her and showed her and her realtor this
13 inventory home -- one in a thousand. He told you he could
14 remember three occasions, and we're talking about over a
15 thousand prospective buyers.

16 That is not customarily and regularly. I would tell
17 you that is the rarest of rare, and that does not rise to the
18 level of outside sales.

19 It's very clear that they rarely even dropped off
20 these fliers and gave them to the receptionist, but if they did,
21 they weren't making presentations. The realtors weren't even
22 there. They were dropping off some fliers where maybe -- maybe
23 one day they'd get a call from that, but more likely than not
24 they were going to call the number on there, which went to the
25 toll free number to the online center.

1 The evidence is also undisputed that they never ever
2 went to any customer's home or any customer's place of business
3 in order to sell them a new home or a mortgage.

4 So the very first question you're going to get -- the
5 very first question, question No. 1, is going to be on the
6 outside sales exemption.

7 Do you find that Meritage -- not us, Meritage. We
8 didn't have to say a thing. This is Meritage. Meritage has to
9 prove to you by a preponderance of the evidence that these three
10 plaintiffs, Donna Armstrong, Tim Gonzalez and David Lipnicki,
11 that they were employed in the capacity of an outside
12 salesperson under the outside sales exemption, and they can't be
13 both.

14 You're either inside sales or you're outside sales.
15 And it's very clear here that the outside sales exemption does
16 not apply to these three plaintiffs. So we would ask, when you
17 get this question, for all three of them please check "No."

18 So the next question you're going to be asked is how
19 many hours did they work each workweek. You heard Donna
20 Armstrong's testimony. She conservatively estimated that she
21 worked an average of 55 to 60 hours a week.

22 I would submit that Donna deserves to get the higher
23 end of that because she was being conservative in her estimate.
24 Tim Gonzalez estimated 70 hours a week. David Lipnicki
25 estimated 65 to 70 hours a week, and, again, he was being

1 conservative. I would submit that he should get the higher end
2 of that estimate.

3 So what are hours worked? Hours worked include all
4 time spent by an employee that was primarily for the benefit of
5 the employer or the employer's business, and it's whether or not
6 the employer knew or had reason to believe that the employee was
7 doing the work.

8 Well, the evidence shows that -- that they knew. They
9 knew the long hours that they were working. They knew that that
10 sales office was going to be open 363 days out of the year.
11 They only close two days, Christmas Day and Thanksgiving Day.

12 That means that New Year's Eve, New Year's Day,
13 Mother's Day, Father's Day, Fourth of July, Labor Day, Easter,
14 that sales office was open and these folks were working.

15 Now, in terms of coming up with a number of hours, I
16 don't want you-all to believe that somehow they have to give you
17 some sort of figures. They can't do that, and the reason that
18 they can't give you an exact number is because Meritage didn't
19 keep time records.

20 You heard them say they could have kept time records.
21 They even looked at alarm codes. They could have kept records,
22 but Meritage did not follow their requirement to keep records.
23 The law requires the employer to keep the records.

24 Because they failed to keep records, now we only have
25 their reasonable estimation. And that's all the law requires,

1 that they give you a reasonable estimate of the number of hours
2 that they worked. That's all, just a reasonable estimate.

3 Now, their reasonable estimate is based on the fact
4 that they worked beyond even the stated business hours. They
5 would arrive early to do those opening procedures you heard
6 about. They worked through lunch.

7 They would stay late. Then they would do the closing
8 procedures. Sometimes they worked six to seven days a week.
9 They worked holidays, and they worked weekends. And Meritage
10 knew this.

11 *(Excerpt of video deposition of Ms. Jeanne Conger played as*
12 *follows.)*

13 Q And how many hours a week did your husband work when he
14 worked at Pulte?

15 A Probably 70 hours a week.

16 Q With your experience in the industry, did you find your
17 husband's work hours of 70 hours a week as a salesperson to be
18 pretty much the norm for the industry?

19 A Yes.

20 *(Excerpt of video deposition of Mr. Steve Harding played as*
21 *follows.)*

22 Q (BY MS. WILLS) So it's true that some salespeople work more
23 than five days a week?

24 A That is possible.

25 Q Isn't [sic] also true that in advertising for this position

1 Meritage says that salespersons must be able to work over 40
2 hours a week, work weekends and nights if necessary?

3 A Yes, ma'am.

4 Q And, in fact, they also advertise this position as being one
5 where they have to be available to work, as needed, seven days a
6 week?

7 A Um, yes, ma'am.

8 *(End of video deposition excerpts.)*

9 MS. WILLS: So the very next question you're going to
10 get -- after you answer question one "no," the next question
11 you're going to get is: How many hours did they work? And the
12 very first person's going to be Donna Armstrong because it's in
13 alphabetical order, and you're going to have a workweek for each
14 week that's within the relevant time period.

15 So you're not going to have a workweek for the entire
16 time that she worked there. It's only going to be for the time
17 that the Court has determined is the relevant time period.

18 So you're going to have to put a number into each and
19 every one of those blanks in order for Ms. Armstrong to be able
20 to recover for those hours worked. We're asking that when you
21 get to this question two for Donna Armstrong, that you fill in
22 the number 60 in each and every one of those blanks for each and
23 every week because that is Donna Armstrong's reasonable
24 estimate, and the law says that's -- that's all she's required
25 to do, give you a reasonable estimate.

1 Her reasonable estimate has in no way been
2 contradicted by Meritage. They've not contradicted her
3 reasonable estimate. Jeanne Conger, who was over Houston who
4 actually worked with Donna -- didn't supervise her but was two
5 levels above her -- said 70 hours is the norm. So 60 hours for
6 Donna is certainly reasonable.

7 Then you're going to get also as a part of question
8 two -- and Donna Armstrong's going to be two or three pages of
9 just blanks with weeks. Then you're going to get to Tim
10 Gonzalez, which is a shorter period.

11 We're asking that for each and every blank there for
12 Tim Gonzalez, that you put 70 hours in for Tim, which is the
13 reasonable estimate that he gave. And that's basically what
14 Jeanne Conger told you, 70 hours is the norm for the industry.

15 Same thing for David Lipnicki. We're asking that you
16 put 70 hours in for each week for David Lipnicki.

17 Now, I'd like to conclude by sort of stopping where
18 Mr. McLaughlin started with you last week. Do you remember when
19 he did his opening statement? He told you that this case was
20 going to be about credibility, and I believe that it is about
21 credibility.

22 And based on everything you've sat here and listened
23 to, what you've seen, what you've heard, I want you to ask
24 yourselves about the credibility of Meritage. Let's look at
25 their credibility. Now, they would have you believe that the

1 outside sales exemption applies to this clearly inside sales
2 position, so let's take a look at what they did in order to try
3 to one day convince a jury like you of this.

4 Well, on the very first page of their compensation
5 agreement, they have something that, frankly, defies all
6 credibility. They say, "The associate must customarily and
7 regularly take customers to see model homes."

8 Well, they're stationed in a model home. They're not
9 going to customarily and regularly take anybody to see a model
10 home because that's where they are. And the evidence has shown
11 that if they wanted somebody to see another model home, they
12 give them directions and send them over to that model home so
13 that the other salesperson could do teamwork and help with
14 somebody else's sale.

15 Then they go on to say they're also supposed to take
16 them to see sites. Well, ladies and gentlemen, the only way to
17 pick out a site was to select a floor plan, an elevation, and to
18 use that plat map. It completely defies logic that you're going
19 to go out there with some kind of a weird tool kit that nobody
20 ever provided to them with some cones -- and Donna's going to be
21 out there. She's going to put on her boots. I think Amy Fisher
22 said her boots were knee high.

23 You're going to put on some boots and some spray, and
24 you're going to spray out the pool and have some rope. That's
25 not -- that's not credible at all. That's not even logical.

1 You're not going to take folks out there when you need
2 a surveyor, you need construction people, you need an engineer.
3 They can't go out there and tell you where your house is going
4 to be built. Completely illogical.

5 Then they go on to say -- just to show you what little
6 credibility Meritage has, they go on say then they're supposed
7 to call upon customers at their homes. Have you heard a shred
8 of evidence of any salespeople going to somebody's house to sell
9 them a new house? Absolutely defies all credibility.

10 And then they say --

11 THE COURT: About five minutes, Ms. Wills.

12 MS. WILLS: -- you're supposed to travel to various
13 locations -- thank you, Your Honor -- in order to conclude the
14 sales transaction. Ridiculous.

15 The only evidence that you heard was that the
16 contracts -- which is obviously how you're going to conclude a
17 sales process, right? You got to get the contract -- they
18 happen 100 percent of the time inside of the office.

19 You heard their vice president of human resources
20 admit the mortgages, 100 percent of the time those were done in
21 the office. They already knew, no, they're not customarily and
22 regularly out selling mortgages.

23 I ask you to look at the credibility of Meritage and
24 what they brought before you and the kind of evidence that they
25 brought in this courtroom before you. Look at their

1 credibility. They're telling you the outside sales exemption,
2 ladies and gentlemen, they don't even know what the outside
3 sales exemption is.

4 I want you to listen again to Rick Harvey, the guy
5 who's over all of Texas. Twenty-five years he's been with
6 Meritage. I want you to listen to what he has to say about the
7 outside sales exemption. Then I want you to listen to Jeff
8 Grobstein, regional vice president, officer of Meritage.

9 I want you to listen to what they have to say about
10 the outside sales exemption, and then I want you to evaluate the
11 credibility of Meritage.

12 *(Excerpt of video deposition of Mr. Richard Harvey played*
13 *as follows.)*

14 Q What's the outside sales exemption?

15 A I don't know.

16 Q So is it fair to say that you have never undertaken to do
17 anything to determine whether or not any of the salespersons
18 working, in any of the divisions that you've been in charge of,
19 whether or not they are workers that would fall under the
20 outside sales exemption?

21 A Uh, I -- I haven't done anything personally, no.

22 Q (BY MS. WILLS) Do you know of anything that's been done?

23 A No.

24 Q As you sit here today, do you have a belief as to whether or
25 not the outside sales exemption applies to the -- all those

1 salespersons that work in your various divisions that you're
2 responsible for?

3 A I don't know what that is.

4 Q (BY MS. WILLS) So you have no idea whether that exemption
5 would apply to them?

6 A I have no idea.

7 (Excerpt of video deposition of Mr. Jeff Grobstein played
8 as follows.)

9 Q What's the outside sales exemption to the Fair Labor
10 Standards Act?

11 A I don't know.

12 (End of video deposition excerpts.)

13 MS. WILLS: The reason that they don't know, the
14 reason they've never heard of it is because it doesn't apply.
15 These are inside salespeople, ladies and gentlemen, and we ask
16 that when you get that jury form, you indicate on there this is
17 not an outside sales position.

18 They don't even know what it is. They don't know what
19 it is because it doesn't apply. They're inside sales.

20 I'd like to thank you for your time and your
21 attention. And I'll get one more opportunity to talk to you
22 again, but, again, we ask that you look at the credibility of
23 Meritage. Look at what they did. Look at the evidence that
24 they gave you and ask yourselves whether or not you can believe
25 anything that they say.

1 *(Other matters discussed pertaining to jury trial.)*

2 *(Recess taken from 10:08 a.m. to 10:20 a.m.; Discussion had*
3 *regarding student visitors in courtroom.)*

4 *(Jury in at 10:23 a.m.)*

5 THE COURT: All right. Be seated, everyone.

6 All right. Ladies and gentlemen, we have some more
7 guests in the courtroom. Some students were touring the
8 courtroom today, and they heard we had a trial, so they've come
9 to watch the closing argument.

10 So with this bigger audience, Mr. McLaughlin, whenever
11 you're ready, you can go ahead.

12 MR. MCLAUGHLIN: Thank you, Your Honor. May it please
13 the Court, counsel, good morning, ladies and gentlemen. Nice to
14 be able to talk to you-all again.

15 First, I want to thank you for your service, paying as
16 close attention as you paid during this trial and the time
17 you've put into it. You've been a very attentive jury. Thank
18 you very much for that.

19 Now, as you all know, when you come here, you bring
20 something special with you. You bring your common sense. You
21 bring it in here every day. It's something you use every day of
22 your lives, and it guides you in the decision-making analyses,
23 judgments, et cetera. And in this case common sense is going to
24 play a major role in the decision you reach.

25 You've heard a lot of testimony, obviously, seen a lot

1 of evidence. You've seen documents. You've seen videos. Now
2 you get to sum all that together and decide what it all means.

3 I want to start by talking about the sales agreements
4 real quick, and we've already talked about those. These are --
5 Defendants' Exhibit 19 is the one I'm talking about right now,
6 but as you know there are several in the record.

7 Now, why do you suppose the plaintiffs never put these
8 two things on the screen together? I did it in opening, as I
9 recall, or talked about them both in opening, and they're still
10 germane. You have 2A that you heard about plenty that talks
11 about the sales manager customarily and regularly taking
12 customers to see model homes and sites, and you have the other
13 provision about presence in the sales office.

14 You've seen both of these. You've seen them together.
15 You've seen them separate.

16 It is preposterous to take the position that a
17 contract that requires the plaintiffs to leave the office
18 prohibits the plaintiffs from leaving the office. This is just
19 one example of the inherent inconsistency that runs through
20 their entire case. Again, I raised it in opening. I want to
21 raise it now.

22 They want to cherry-pick from documents. They want to
23 cherry-pick from -- from a holistic view of the world and just
24 pick out certain things and tell you-all that those certain
25 things are the only things that matter and you should ignore

1 everything else.

2 I also want to talk quickly about the commissions part
3 of this. You've heard a lot about the plaintiffs being paid
4 commissions. The only point I want to make with it right here
5 is that out there in the real world, compensation drives
6 behavior. It always does.

7 The manner in which someone is paid will affect how
8 they behave, how they perform. And all I'm saying by that is
9 someone who is paid only by commission is, by the nature of the
10 beast, going to do everything conceivable to behave in a manner
11 that creates more opportunity. People who are paid with a
12 commission, especially a commission only, are not people who sit
13 around on their hands hoping that opportunity knocks.

14 Instead, they go out and they find opportunity, and
15 these folks have testified that they're go-getters. They're not
16 folks who just sit around. They're folks who are incentivized
17 to succeed, and they've talked about the sales of houses and all
18 that. I'll talk a little more about it, but that's really the
19 point I want to make on commissions.

20 Now, another part of the contract I want to talk about
21 real fast is paragraph 8 in the standards of excellence. You
22 may recall there was a lot of testimony about this escorting a
23 customer to a homesite. And if the plaintiffs could, they would
24 rewrite this to say, "I understand that escorting a customer to
25 a plat map is the highest and best use of some of my time," but

1 it doesn't say that, does it?

2 It says a homesite, folks. A homesite is a homesite,
3 and it's okay if there's dirt on it. I think, as Ms. Conger
4 pointed out very articulately, that even this courthouse rests
5 on dirt. There's nothing wrong with dirt.

6 A homesite's a homesite, not a plat map, okay? And
7 I'm going to get to that a little bit more, but right now I want
8 to -- I want to pause, and I want to note another thing about
9 this case that is really fascinating.

10 It's fascinating that they are here telling you that
11 they did not do a job they were trained to do. They did not do
12 the job they were supposed to do. They did not do the job they
13 agreed to do, and yet they want you to give them overtime for
14 not doing what they were supposed to do. There's a tad bit of
15 irony wrapped up in that concept, and it's another inherent
16 inconsistency that runs throughout their case. It's a problem
17 they cannot escape.

18 I want to talk now a little bit about admissions from
19 the plaintiffs, and I started this case in opening talking about
20 some -- what I'd call blackboard statements. You know, back in
21 the day when I was a football player and coach and you talk
22 about the other side made a blackboard statement, that means you
23 go back -- in the old days, you know, you have chalkboards and
24 all that stuff, and you'd write whatever they said on a
25 chalkboard.

1 We're going to see -- we're going to see if that
2 lasts. How's it going to be in the fourth quarter? Where we
3 are -- pardon the football analogy, by the way -- in the fourth
4 quarter, and you still can't sell a house over the phone. And
5 they know it, and they've run away from it. They're their
6 words, and they've run away from it because they're untenable.
7 That's Ms. Armstrong.

8 You know, your next statement -- blackboard statement
9 is Mr. -- Mr. Lipnicki. "To be a highly motivated sales
10 professional who is well organized as well as detail oriented, I
11 also look to continue to utilize my sales experience and my
12 training in the Gold Tier program."

13 You may not remember, but I asked Mr. Lipnicki -- he
14 was sitting right there (indicating), and I asked him,
15 "Continue" -- "'Continue' means you've been doing it, and you're
16 going to do it some more, right?" And he couldn't answer the
17 question. He ultimately just, "I can't answer the question."

18 Well, no, you can't because the question completely
19 undermines your case. That's why you can't answer the question.
20 Because you can answer questions unless the answer's fatal, and
21 it's fatal to Mr. Lipnicki to admit that that was a true
22 statement.

23 He can't admit it's a true statement, so he has to
24 take a position that he just can't answer it because he's also
25 not willing to say it was a lie.

1 You have another statement like this from
2 Mr. Gonzalez, "I have visited schools, day cares, churches,
3 local shops and realtor offices."

4 That's a lot of places and a lot of pleurals, and he
5 turned those pleurales into two trips, as I recall -- two trips.
6 That is a blackboard statement. And, you know, it's great that
7 there's e-mail these days, right, because if we were 20 years
8 ago and there's no e-mail, I don't know how you capture all
9 this.

10 But what we have in these statements -- and I'll talk
11 about this a little more -- are captured moments in time. It's
12 like a photograph. They said something. They wish they could
13 take it back. They can't because it's captured.

14 And let's talk about that a little more. The other
15 thing I really want to point out -- well, let's go to the next
16 slide. We'll talk about their declarations.

17 And y'all may remember Ms. Laura Goodwin talked a
18 little bit about the declarations from the plaintiffs, and what
19 you have -- I'm going to give you exhibit numbers -- in the
20 record, Defendants' Exhibit 14, 15, 38, 39, 49 and 50. Those
21 are six declarations from these three plaintiffs, and I want to
22 talk a little bit about how those changed over time, okay?

23 The first thing you'll note is that the first
24 declaration from 2010, you see in paragraph 4, "In a typical
25 week I spent over 90 percent of my normal workday in the sales

1 office." Now, query. Is that a true statement? I say it's
2 not.

3 I say they spent far more time outside than inside. I
4 say they spent over 60 percent of their time in the sales
5 office, but we'll get to what is my basis for that in a minute.
6 If you take that as a baseline, and if they claim they worked
7 70 hours a week, you're somewhere around six hours a week
8 engaged in outside sales activities. And I'll submit to you
9 right now, six hours a week engaged in outside sales activities
10 is customarily and regularly, and Meritage wins right there.

11 But I'll move -- I'll move on, and I'll build on that.
12 The next thing you see is this "rarely" -- I don't know if the
13 word "rarely" has ever been used so much in four days of trial.
14 Rarely. What does "rarely" mean?

15 Now, you remember Mr. Lipnicki was sitting up here,
16 and I asked him what it meant. And he basically said it means
17 two to three times a month, and we talked about -- you may or
18 may not remember -- a litany of activities two or three times a
19 month.

20 Two to three times a month -- and, again, granted that
21 my math isn't good. I think we talked about 12 to 18 times a
22 month, Mr. Lipnicki and I, on cross-examination on "rarely."
23 And we were talking about showing spec homes, showing homesites,
24 going to see realtors, showing homes under construction, touring
25 the community with a buyer, and you may recall that from the

1 mystery shop where all you saw was the sky and some clouds, if
2 you remember the video.

3 So what do these rarelies [sic] add up to? These
4 rarelies add up to 12 to 18 times a month, and they all use
5 "rarely." Now, look, I think -- I think that they have to
6 concede -- and I challenge them to explain this to you, by the
7 way. How does "rarely" in paragraph 6 become "very rarely" in
8 paragraph 4? Why did that happen?

9 I -- you go from, "I rarely left the sales office to
10 show prospective homebuyers spec houses and vacant lots," to, "I
11 very rarely left the model home for any other purpose." In a
12 typical week -- how did over 90 percent at the top there turn
13 into well over 90 percent on the bottom? What's going on?

14 Why can't they just say one thing and stick to it?
15 Why does it keep changing? If it's truth, it doesn't change.
16 Truth is what it is. It's not relative, okay? It doesn't, a
17 couple years later, turn into something more favorable for my
18 case. That's not how the system works.

19 And I'm going -- I've got some time to spend on
20 credibility, as Ms. Wills pointed out, and I'll tell you right
21 now Meritage paints with a broad brush. Anyone who took that
22 stand and didn't tell the truth, got to flush their testimony
23 because that's not okay.

24 So moving on to the next part of the declaration --
25 and, again, you can compare these for yourself. And, by the

1 way, do you recall Mr. Gonzalez over there sitting up here and
2 saying that he -- I think he said he typed his declaration or
3 wrote it or whatever. I think he said it was his words, and he
4 wrote it up.

5 I wonder if he wrote the other ones because guess
6 what? They -- if they're not identical, they are as close as
7 you can get. I don't want to say they're identical because
8 there may be a word here or there that I'm wrong about, but
9 you'll have a chance to look at them.

10 And ask yourselves: If Mr. Gonzalez wrote his, why
11 are they all the same? That mean he wrote everybody's, or maybe
12 did everybody just get together and come up with the same
13 statement and then come up with another one later that's a
14 little bit different?

15 Anyhow, on this -- on this one, again, this is from
16 the first one. "On average I would show prospective homebuyers
17 spec houses and vacant lots no more than two to three times a
18 month." I'm just dwelling on this "two to three times a month"
19 and "rarely" because at a baseline position, that's enough.
20 That's enough to be customarily and regularly. That's enough
21 for Meritage to win.

22 But, again, I think they recognize that too, and they
23 said, oh, oops, we got to come up with something different. Now
24 it's, "I rarely, if ever" -- both those two words, "if ever,"
25 those are important words. They're not in the first one. Why

1 are they in the second one? Again, does truth change, or is
2 truth what it is?

3 The other thing I think I ought to point out really
4 fast about this inconsistency is you recall all this stuff
5 about, well, we couldn't leave the model. Contract prohibited
6 us from leaving the model. Well, did or didn't?

7 Why is it that when Mr. Lipnicki's up here talking to
8 his lawyer, the word "present" in paragraph 2F means
9 accountable? Why is it that when I asked him, "Oh, so present
10 means accountable? You just knew you had to be accountable for
11 the sales office" -- why is it when I asked him that, he said,
12 "No, no. I'm going to change my testimony. It means physically
13 present."

14 I mean, in the span of 30 minutes you get two very
15 different stories. And why is it that when Ms. Wills showed you
16 Briana Rogan's (phonetic) disciplinary action form, Plaintiffs'
17 Exhibit 25, why didn't she show you the rest of what it said in
18 there? Because it doesn't say anything about being physically
19 attached to the model.

20 It says -- and you can look when you go back -- Briana
21 Rogan was gone for three hours for this, had a doctor's
22 appointment and didn't tell anybody, and it goes into this idea
23 that the model needs to be attended. Not by Briana Rogan, just
24 attended. Pick up a phone, call your boss, "I'm not going to be
25 there. I need coverage," work it out. That's what, you know,

1 grown-ups do with jobs, right?

2 The other disciplinary action form that she showed you
3 and didn't show you all of was one Daniel McManaman (phonetic).
4 If you read that when you go back there and look at the
5 evidence, you're going to see that he, too, was sort of AWOL.
6 It's not an issue of he wasn't sitting at his desk in the model.
7 It's an issue of he's not coming to work on time.

8 Now, there's something to complain about. Gosh, we
9 got to come to work on time. Isn't that awful? I mean,
10 Meritage should be ashamed for requiring its employees to come
11 to work on time or to be -- you know, to be responsible for
12 covering the model home.

13 That's all we're talking about in this case is
14 coverage of the model home. That's all we're talking about.
15 What they're telling you isn't true, and they know it. And you
16 saw the training materials. I'm not going to run through all
17 that stuff again.

18 But do you really think Meritage is training its sales
19 associates to go visit realtors, go do this, engage in the
20 preparation activities and the eight-step process, demonstrate
21 homesites, do all these things that clearly require you to be
22 out of the office, and yet they're prohibited from being out of
23 the office? So I wanted to throw that in again because I think
24 it's very important.

25 Now, you heard this talk about a thousand prospects

1 just now. Why did Meritage only bring one buyer? Well, I got
2 two things to say about that.

3 First is we brought one buyer out of the three
4 Mr. Gonzalez referenced in his testimony, and that one buyer sat
5 here and said, "Oh, yeah, he showed me the house. He took me to
6 the community," after he sat here and told you he didn't.

7 If we had one out of three that clearly shows he
8 wasn't telling you the truth and he did engage in those
9 activities, what would a thousand show you? Is it even rational
10 to think that a thousand people came through in a couple of
11 years and saw Mr. Gonzalez and only one of them went out to see
12 a house with him?

13 You may remember when Mr. Lipnicki was up here, I was
14 talking about three in one week. We were talking about that
15 one-week period, you had three come in. We showed a little
16 exhibit on it. Two of them were on a Saturday, one during the
17 week, and I was trying to establish, okay, so a baseline low
18 threshold of visitors would be, you know, three per week in a
19 given year.

20 I think the -- I think the Court judicially noted
21 3 times 52 equals something. I don't remember. Point is --
22 point is, that's a lot of people.

23 That is a lot of people, and that's why, when I said
24 90 percent of their -- over 90 percent of their time in the
25 sales office, no way. No way, okay? If you're seeing a

1 thousand people in two years, you're out way more than five or
2 six hours, although five or six hours, we win. I'll talk about
3 that later.

4 Now, on the declarations, I just want to -- I want to
5 wrap up the declarations, and I want to note, again, what I'm
6 talking about right now is what they've admitted to, okay? And
7 whether it's a declaration or whether it's sitting up here,
8 things like Ms. Armstrong saying she showed -- I believe it was
9 a spec -- when it made sense, things like that.

10 We've got testimonial items where they've admitted
11 certain things two to three times a month, what have you. From
12 that I want to build into something that -- okay. Now I want to
13 talk about the mystery shops real quick. Those mystery shops
14 are, once again, captured moments in time.

15 And, you know, I'm going to -- if we could visualize
16 this captured-moments-in-time thing as a blank white board,
17 maybe like one of those back there (indicating) -- just a blank
18 white board, and every now and then we put a mark on it. Maybe
19 the mark is for 12 to 18 times a month, if you put all those
20 marks on there. Maybe the mark is for mystery shops, okay?

21 Mr. Lipnicki -- now, they started this case running
22 for the hills from mystery shops. You may or may not recall,
23 but in opening statement they dealt with it because mystery
24 shops scare them to death. So they had to tell you, oh, that's
25 fake. It's not a real buyer. I don't know how many times you

1 heard that, a bunch of times.

2 Well, why? Why does it matter? I mean, why are they
3 worried about it? If they really never left, why didn't they
4 just say, well, you know, these mystery shops reflected a real
5 thing, and we were just lying to our employer. We were just
6 misrepresenting to the company that this is how we do our job.
7 We're sorry. We probably shouldn't have, but we never left.

8 Why didn't they just say that? They didn't say that.
9 In fact, Mr. Lipnicki, again, agreed -- you know, they went
10 through the whole fake thing. And I asked him, "Mr. Lipnicki,
11 even though you say that was a fake thing, was your performance
12 real?"

13 Answer: "Yes."

14 "And that reflected the truth about how you did your
15 job, didn't it?"

16 Answer: "Yes."

17 Captured moments in time, more admissions. These
18 mystery shops are these plaintiffs representing to Meritage back
19 in the day how they did their job, and you should accept those
20 representations as true. And if those mystery shops are how
21 they did their job, it's not just how they did their job on the
22 mystery shops, it's how they did their job every time a buyer
23 visited who wanted to see something. And if there's a thousand
24 buyers, there's a lot of visits where a buyer wants to go look
25 at a house.

1 And does anybody seriously think that a buyer's
2 content to look at a plat map on a wall and say, "Yeah, those
3 look like nice lots. Sign me up"?

4 No chance. No chance. You want to see the dirt. You
5 want to see the trees. You may even want to see the horse farm
6 Mr. Harding talked about. Maybe not, but that's real life.
7 That's real-world stuff.

8 You also -- they talked a lot -- well, I'm going to --
9 run away. They're running away from the mystery shops. They're
10 caught on the mystery shops, and those are real.

11 Now, what else have they done that you can
12 realistically consider fleeing, fleeing from the scene, kind of?
13 Here's one. Why all this talk about the "up" system? Who
14 cares?

15 Mr. Lipnicki never had a sales partner. Mr. Gonzalez
16 never had a sales partner. Ms. Armstrong never testified that
17 she had a sales partner although counsel referred to it when
18 talking to Ms. Conger. So your record there's just sort of
19 nebulous.

20 Maybe she did, maybe she didn't. Maybe she did for
21 just a little period of time near the end of her employment.
22 Record's not real clear. But why -- and you remember Bobby
23 Allen? And I asked Mr. Allen who -- you know, we had our
24 differences, I guess. We'll get to that.

25 But I asked Mr. Allen, "Mr. Allen, does it make sense

1 to sit in here and talk about the 'up' system when none of the
2 plaintiffs experienced it?"

3 And even Mr. Allen had to agree with me on that, so
4 why are we talking about the "up" system? Why are they spending
5 time on stuff that doesn't matter, doesn't pertain to the case?

6 Why are we talking about fluffing pillows? I'll bet
7 you there's an hour spent on fluffing pillows and turning lights
8 on and listening to music and, I don't know, picking stuff up
9 off the floor, whatever it was. Remember that checklist of
10 all -- have you heard anyone from Meritage say they don't do
11 those things? I don't think you have.

12 In fact, I know you haven't because they do them.
13 It's fine. They do some things inside. They do some things
14 outside. Meritage is very comfortable with that. You know why?
15 Because that's reality. That's how it went down.

16 Fluffing pillows is a distraction. The "up" system is
17 a distraction. Look over here, don't look over here. Look at
18 the "up" system.

19 Selling mortgages is a distraction. Who cares? Who
20 cares? Being at work on time, whining about that, that's a
21 distraction, okay? And, again, look at the exhibits, and you'll
22 see that they say much more than what Ms. Wills told you about
23 when she was up here.

24 The last thing I'll say about the mystery shops is
25 Mr. Gonzalez doesn't have one, okay, and we've acknowledged

1 that. We had something better, though. We had Ms. McClellan,
2 who was a buyer and who told you how Mr. Gonzalez did his job.

3 Now, I want to move over to credibility. I -- as I
4 said at the beginning of the case, credibility is the most
5 important thing in this case. And you as the jurors have the
6 unique ability and province of determining credibility of
7 witnesses.

8 And I believe we have a -- I believe you have in your
9 charge an instruction from the Court on credibility, and this is
10 it. "As the sole judges of the facts, you must determine the
11 credibility or believability of each witness and what portion of
12 his or her testimony you accept and what weight you attach to
13 it."

14 Now, I'm going to start with Amy Fisher, who you heard
15 from yesterday. Amy Fisher was not credible, to say the least,
16 and there is no running away from that. And we were shocked and
17 disappointed by what we heard, and you should -- you should hold
18 that against her. What she told you should not be anything you
19 consider as true because if a witness sits up here and says
20 anything that you don't think is true, you should abandon
21 everything else the witness told you, okay?

22 But as I said, we're going to paint with a broad brush
23 on credibility.

24 Now, before I -- before I move on on credibility, I
25 also want to talk about something Ms. Wills just told you-all.

1 She showed you a portion of the jury charge that pertained to
2 recordkeeping, and that portion of the charge reads -- it's on
3 page 15 of the charge when you get it. "If employees are not
4 exempt under the FLSA," comma -- well, there it is. The law
5 requires an employer to keep records of how many hours its
6 employees work, et cetera.

7 What she showed you did not include the clause "if
8 employees are not exempt under the FLSA." Question: Why not?
9 Why not show you everything?

10 Now, moving on, let's talk about credibility. If --
11 oh, actually, before I do that, let me talk about Mr. Grobstein
12 and Mr. Harvey not knowing anything about the outside sales
13 exemption.

14 Do you remember that Ms. Wills played you video from a
15 guy named Wade Thomas, the vice president of human resources?
16 She didn't play you anything with her asking him anything about
17 the outside sales exemption, did she? Instead, she asked a
18 bunch of division presidents who are worried about building
19 houses. Why? Why? You know, look here, don't look here.

20 Now, Donna Armstrong up here took the position that
21 she did not have remote access until Ms. Silver pulled out one
22 of those e-mails again -- one of those inconvenient e-mails --
23 "I will check my e-mails while I am out of the office." Well,
24 how would you do that if you didn't have remote access? And why
25 would you sit up here and say you don't have remote access if in

1 fact you do?

2 You heard Mr. Harding talking about remote access
3 being available for all sales associates as of 2007. Here's
4 why. Here's why they won't admit they had remote access until
5 Ms. Armstrong had to. They got a bunch of e-mails they want you
6 to look at that show they were sent after model home hours, and
7 they're trying to tell you those e-mails -- if one was sent at
8 10:00, let's say for example, that means somebody worked three
9 hours past 7:00, past the closing point.

10 So they had to take the position that they didn't have
11 remote access to make you believe that. Oops, they did. They
12 did, and that means they could have just sent a snippet of an
13 e-mail investing five minutes of time versus the three hours
14 they would claim on that day I gave you the example of.

15 Ms. Armstrong also took the position that you can --
16 that she could show homesites and inventory or spec homes in
17 several different ways. "I can show it on my plat map." So if
18 we had a plat map here -- and I won't get one -- say, well,
19 that's where the spec is, I'm showing a spec home.

20 So all those e-mails where -- Ms. Silver went through
21 them with her where she's saying I showed this, I showed that,
22 I'd love to show you this, et cetera, she had to come up with
23 some different meaning for the word "show" other than the common
24 sense contextual meaning you would take away from the e-mail.

25 And she had to do that because they don't want to

1 admit they were outside any more than what they've admitted. So
2 "show" doesn't mean show, basically. There's some other things
3 like that, and I want to move to those.

4 Mr. Lipnicki -- Mr. Lipnicki took the position that
5 the training Meritage gave him tempted him to violate his
6 contract by leaving the model home sales office. He also said
7 that "take" doesn't mean take. "Continue" -- I already talked
8 about that -- doesn't mean continue. And you can visit people
9 by e-mail.

10 Now, when you see "visit" in the ordinary connotation
11 of the word and you -- and contextually we're talking about that
12 realtor relation stuff, go and visit realtors. And he was
13 telling you, "Well, I did go visit when I sent him an e-mail."
14 "Visit" doesn't mean visit.

15 If we can't even get folks to get up here and say that
16 "visit" means visit and "take" means take and "continue" means
17 to continue, there's not a word that comes out of their mouths
18 that you can rely on. It's not credible. Why? Why won't they
19 even grant common sense meaning to words they used back in the
20 day? Why?

21 Now, Mr. Gonzalez -- and I got to tell you, this is a
22 personal favorite of mine. Berry -- I remember Ms. Williams
23 asking -- and I'll confess I didn't know what was next. But she
24 asked about "berry," and, you know, I'm thinking, okay. And
25 Mr. Gonzalez said, "Well, those are strawberries," and I'm

1 thinking, okay, kind of a weird lunch, but okay, strawberries.

2 And then we move on to the Chili's receipt, and we see
3 that Berry is actually Mr. Berry, not a bunch of strawberries.
4 And at that point Mr. Gonzalez had to throw in the towel and
5 concede that he kind of didn't recall. Berries, strawberries,
6 Mr. Berry? I mean, if -- if you can't even rely on a witness to
7 sit up here and say, "Yeah, I took a Mr. Berry to lunch one
8 time" -- just one time -- if you can't even rely on that, how
9 can you rely on anything they say? You can't.

10 All right. Now, where am I going with all of that?
11 Well, I've talked about Ms. McClellan, so I'm going to tell you
12 where I'm going now. I'm going to talk about inferences next
13 and why -- oh, I'm sorry, Bobby Allen. I don't want to forget
14 Bobby Allen.

15 You guys remember Bobby Allen. The first thing I want
16 to point out about Bobby Allen is you recall him saying it was a
17 hostile environment when -- when the lawyer came and took his
18 statement from me [sic]. That was hostile. I -- you know, she
19 made stuff up. She -- I was very offended that she used the
20 word "expectations" instead of suggestions because that's --
21 obviously, that's offensive, right? I mean, that's a
22 horrible -- horrible thing for someone to do.

23 And then you can walk a spec home while you're sitting
24 in an office. You can walk homes under construction while
25 you're sitting in an office. This man sat up here and said this

1 under oath.

2 You can drive the community while you're sitting in an
3 office. You can make at least one realtor visit a week while
4 you're sitting in an office. Now, why did he -- why did he say
5 things that obviously preposterous? It can't be that he just
6 misunderstood a question because it happened four times.
7 Just -- why I kept asking him.

8 Why would he accuse Ms. Becraft, whom you met, of
9 creating some sort of hostile environment to take a statement
10 from him? You heard her saying, "Oh, no, he helped. He was
11 cooperative. He actually looked at it while I was typing it and
12 had input" and all of that.

13 Well, you talk about two widely different stories,
14 which one's believable? Who has the agenda? Who has the dog in
15 the fight?

16 You heard Mr. Allen saying, "Hey, if they lose, I
17 lose." That's the same thing as saying I got to toe the line.
18 I got to say whatever they're saying, whatever they want me to
19 say, so I can live to fight another day.

20 Not only should you discount this stuff that's just
21 clearly incredible, you should draw some inferences from it,
22 okay? When -- when I take someone to lunch or go somewhere in
23 my car with a guest -- as you might recall, the passenger seat
24 is always horizontal, okay, because I've got this 6'6"
25 15-year-old kid who does nothing but sleep on the way to school

1 and sleep on the way home. I don't even know if my passenger
2 seat sits up anymore.

3 So people join me, and they're like, "Who's been
4 sleeping in your car? That's weird." And I'm thinking, how do
5 you know someone was sleeping? Answer, well, I infer it. You
6 got a horizontal passenger seat, I'm going to reach an inference
7 someone's sleeping in your car every day.

8 If these folks had come in here and made these
9 preposterous statements and testimony that I've just reviewed
10 with you, what can you infer from that? Remember we had a
11 baseline when I was talking earlier of things they've admitted.
12 You can build on those admissions -- not that you need to
13 because we win without it, but you can build on those
14 admissions. And you build on those admissions with inferences
15 that there is something they're hiding. And what is that?

16 What they're hiding is the fact that mystery shops
17 showed a day in the life. It showed how they did the job
18 regularly and customarily. What they're hiding from is the fact
19 that all those e-mails that Ms. Armstrong had out there,
20 captured moments in time, shows how she did her job customarily
21 and regularly.

22 And if you think back to that white space like I'm
23 talking about over there and you mark all these captured moments
24 in time, you still have a lot of empty space. How do you fill
25 that space? You fill it with inferences. You fill it with

1 inferences based on why these three people and Bobby Allen came
2 into this courthouse and told basically the same story over and
3 over again, a story that simply cannot be true. It just cannot
4 be true.

5 THE COURT: You used about half your time.

6 MR. MCLAUGHLIN: Thank you, Your Honor.

7 So fill the white space.

8 Now, let's talk about the jury charge a little bit,
9 and I -- actually, I'm going to sit down way before my time's
10 up, give y'all a break, but let's talk about the jury charge a
11 little bit. This is the part on inferences -- excuse me.

12 "While you are to consider only the evidence in the
13 case, you are permitted to draw such reasonable inferences as
14 seem justified in the light of common experience." It is
15 justified to infer that the empty space is filled with
16 inferences that they were out all the time. They were out a
17 lot. Even their baseline admission is just the beginning, tip
18 of the iceberg.

19 Next, I want to talk about the customarily and
20 regularly portion of the charge. And you see that this says,
21 "It means a frequency that must be greater than occasional but
22 which, of course, may be less than constant. Tasks or work
23 performed customarily and regularly includes work normally and
24 recurrently performed every workweek. It does not include
25 isolated or one-time tasks."

1 Now -- and I don't have the next sentence on there.
2 Ms. Wills has showed it to you. She probably will again. The
3 next -- the next sentence is the one that she's trying to tell
4 you requires some sort of amount of time component, and she told
5 you a lot of things that are not in the charge about this.

6 You're just concerned with were they out, was it --
7 were the functions they were engaged in relatively important --
8 that's how the language of the charge works -- and answer those
9 questions in conjunction with this. Were they outside?
10 Clearly, they were outside.

11 And the next part of the charge tells you -- I want to
12 go down to -- well, I want to start there. "Properties located
13 within the Meritage subdivision but outside the model homes,
14 such as other lots for sale, and places outside the Meritage
15 communities are not part of the employer's place of business."

16 In this case, the way this charge has been given to
17 you by the Court, Meritage's place of business is that sales
18 office model home -- the model home sales office and the
19 corporate office. You heard some testimony that the plaintiffs
20 may have gone to the corporate office for training once a week
21 or whatever. Those are the two places that are Meritage's
22 places of business.

23 Every spec home, any model home that wasn't a model
24 home from which they were officing, okay, lots, communities,
25 realtors, all of that was stuff away from the employer's place

1 of business, and it all counts, okay?

2 Now, the other thing I want to point out is the last
3 paragraph there. "Exempt outside sales work includes work
4 performed incidental to and in conjunction with the employee's
5 own outside sales or solicitations." Now, everything they did
6 was incidental to their own sales or solicitation.

7 They were not -- you heard no evidence that they were
8 working for someone else's sales. Ms. Wills is trying to say
9 that the fact that they were out so much that Meritage had to
10 use a call center number, she's trying to tell you that means
11 the sales could have gone anywhere.

12 There's no evidence of that at all. There's no
13 evidence of that at all. All that shows you, the call center
14 stuff, is, as Mr. Harding said, they were out too much for us to
15 put a number for the model home sales office. We had to put a
16 call center number, and the call center would direct the lead to
17 the sales associate. Everything they did was work incidental to
18 their own sales or their own solicitations as it says right
19 there.

20 Now, the -- the fundamental sort of bottom line here
21 is the last question I want to talk to you about, and this is
22 the question that we're going to ask you to answer, and I'll get
23 to that in a minute.

24 "Do you find that Meritage has proven by a
25 preponderance of the evidence that the following plaintiffs were

1 employed in the capacity of an outside salesperson under the
2 outside sales exemption?" Preponderance of the evidence, that
3 is -- if you use my lowbrow football analogy, that is crossing
4 the 50-yard line just barely. That is 50.05 percent rather than
5 49.95 percent.

6 A preponderance is just more likely than not. Is it
7 more likely than not that the following plaintiffs were employed
8 in the capacity of outside salespersons? Capacity, there's an
9 interesting word.

10 Meritage certainly thought so, right? And now the
11 plaintiffs are here saying, "Well, no. You know, yeah, we
12 signed all that stuff. We did the training. We -- we performed
13 on the mystery shops. We represented to Meritage by virtue of
14 our performance on the mystery shops that we were performing in
15 the capacity of an outside salesperson, but we would now like to
16 come into federal court and change our mind.

17 "We'd like to change our mind. We'd like to change
18 our story. We'd like to run away from everything we said back
19 in the day on all of our e-mails, the mystery shops, everything
20 else. We've -- and our -- by that, our declarations, too. We
21 didn't like our first set of declarations, so we did a second
22 set.

23 "We didn't love that, so when we came here, we kind of
24 nuanced that, too. So our three or four stories we've told,
25 we'd like to run away from all of that, and we deny we were

1 employed in the capacity of an outside salesperson."

2 Now, I've said why I think Meritage wins and, again,
3 talking about what they've admitted, I layered on top of that
4 the credibility issue, and I've asked you-all to make some
5 inferences above and beyond what they've admitted. And the
6 fundamental bottom-line truth here is they were employed in the
7 capacity of an outside salesperson, each one of them.

8 You should answer -- Meritage is asking you and I'm
9 asking you to answer each one of those questions yes. Answer
10 each one of those questions yes, case is over, and that's how
11 this should end. It should go no further.

12 In the off chance that you don't answer "Yes" and you
13 decide to go further, I have to address the hours issue because
14 I don't get to come up here again. I'm done, and Ms. Wills has
15 got another 20 minutes. And so you listening to me is over --
16 probably a good thing for you-all, but it's over now. And so on
17 hours, all I want to say is remember remote access, remember the
18 tearoom.

19 I mean, how can they credibly take the position that
20 they worked all these hours? They've got nothing to show you on
21 these hours. They -- they're critical of Meritage saying, well,
22 Meritage doesn't have any records, and they forgot to tell you
23 that Meritage doesn't have to keep records for -- for exempt
24 folks, okay? They didn't mention that.

25 So how does Ms. Armstrong have a second, whatever,

1 business -- a tearoom that she's going to quite a bit in these
2 captured moments of time? You know she went a lot more than
3 what we caught her on. How does Mr. Gonzalez have time to be
4 reading because no one's dropping by, and he has to tell you up
5 here, "Well, I was reading a lot of contracts"?

6 You know, how do they deny remote access when they had
7 remote access, and it's obvious? It's all an effort to make you
8 believe they worked far more hours than they worked. Granted,
9 Meritage has no records to show you how many hours these people
10 worked. It didn't keep records. It didn't have to because the
11 answer to that question is yes, and that's the end of the
12 inquiry.

13 Thank you very much for your time and for your
14 attention. We really, really appreciate it. Thank you.

15 THE COURT: All right. Ms. Wills, your rebuttal?

16 MS. WILLS: Yes, Your Honor, just a brief rebuttal.

17 Ladies and gentlemen, one thing I'd agree that
18 Mr. McLaughlin said. I'd like you to use your common sense
19 here. He's right, your common sense. I want you to use your
20 common sense and ask you: Does your common sense tell you that
21 they're inside sales or outside sales? Because they can't be
22 both.

23 You have to decide: Is this an inside sales job?
24 Because if it's an inside sales job, Meritage should have been
25 keeping up with all those alarm codes that they were checking

1 that they can't seem to find these days. Meritage should have
2 been keeping time records because this is an inside sales job.

3 Now, for some strange reason Meritage wants you to
4 believe that the "up" system was just something that only
5 happened when you had two people in an office and there were
6 altercations, which you heard about those.

7 People were fighting over customers. They weren't
8 going to be out dropping off some fliers or, I don't know,
9 wandering around with that look book or wandering around with
10 that kit. They were actually fighting over the customers that
11 came into the office.

12 The "up" system -- and you heard the executive say it.
13 Not my words, you heard the words straight out of their mouths.
14 The "up" system meant that you had to be present to get a sale.
15 There's no question about that. If you weren't there, you
16 weren't going to get a sale. You had to be there in the model
17 home sales office because this is an inside sales job.

18 Now, he made -- Mr. McLaughlin made a big deal of
19 saying Wade Thomas -- you remember him? Vice president of human
20 resources. I showed you the clip from him, Wade Thomas, vice
21 president of human resources.

22 Now, it's interesting that plaintiffs are the only
23 ones that showed you any testimony from Mr. Thomas. He's their
24 vice president of human resources. Why wasn't he here
25 testifying to you?

1 You know, I -- I showed you -- I showed you testimony
2 from the vice president of human resources, and I specifically
3 asked him the question about whether or not these mortgages were
4 being customarily and regularly sold outside of the office, and
5 he said no, of course not. Meritage knew that. This was all
6 inside sales work that they were doing with these mortgages.

7 We're not running away from anything, ladies and
8 gentlemen. We're the only ones that showed you testimony from
9 their executives, and I mean the high-up executives.

10 I'm talking Rick Harvey, the guy that's been with
11 Meritage for 25 years who's over all of Texas, the guy that can
12 hire and fire a whole bunch of people, the guy that was in
13 charge of everything. We're the only ones that presented his
14 testimony to you.

15 We're not the ones who are running away here. We're
16 not the ones who are running away from the truth here.

17 Now, you've seen a lot of e-mails. You're going to
18 get them. You're going to have a chance to look at them. When
19 you look at these e-mails, you'll see things like Donna
20 Armstrong, 8:09 at night, saying, "Sorry my report is late. I
21 was working with a buyer that couldn't decide tonight."

22 Another e-mail she sent at 7:28 p.m. "Sorry, David.
23 My last customer just left."

24 When you read those e-mails, it's going to be very
25 clear to you these inside salespeople, Donna and David and Tim,

1 they're in the office. This is an inside sales position.

2 Now, I just want to be clear about customarily and
3 regularly. We talked about that. Customarily and regularly
4 must be greater than occasional, more than occasionally, okay?

5 If it's just occasionally, that's not enough. It's
6 got to be more than occasionally. It also has to be work that
7 is normally and recurrently performed every workweek -- normally
8 and recurrently performed every workweek.

9 And when you're trying to decide customarily and
10 regularly, you've got to do a balancing. That's the Court's
11 instruction to you. You're supposed to consider the relative
12 amount of time spent inside the office versus outside of the
13 office.

14 Now, Mr. McLaughlin showed you their declarations.
15 They've always maintained that, "I spent well over 90 percent of
16 my time in the model home sales office," and they later added
17 most of the other time was spent up at the corporate office.
18 Both of those are inside sales. They're Meritage's places of
19 business. We're not running away from anything.

20 What you didn't hear and what you haven't seen any
21 evidence of is -- they're the ones with the burden. Why didn't
22 they come in here and show you what percentage of time they
23 claimed they're working outside of the office? That's because
24 this is an inside sales position.

25 And then the other thing that the Court's instructions

1 tell you to do: Look at the amount of time. I mean, some
2 workweeks they told you, "I spent 100 percent of my time in the
3 sales office, in the model home or at the corporate office."

4 So the second thing you've got to do is you've got to
5 weigh the importance. Where are the important things happening?
6 Are they happening inside Meritage's places of business, that
7 model home, that sales office, or are they happening outside?

8 You have seen it. Everything that's important, that's
9 critical is happening right there inside that model home sales
10 office.

11 Even Mrs. McClellan, the homebuyer you saw, she sat
12 right there and told you, "It didn't matter whether Tim Gonzalez
13 showed me and my realtor that house or not. I was going to buy
14 it. What he did didn't matter. That wasn't important to me."
15 No. The important things here happened inside the model home
16 sales office.

17 Now, finally, I have to tell you I was shocked -- I
18 was shocked when I heard Mr. McLaughlin get up here and talk to
19 you about credibility, talk to you about fleeing the scene and
20 running away. I think he just told you Meritage is now ready to
21 flush -- I think his words were "flush away" Amy Fisher's
22 testimony.

23 Amy Fisher, that young woman that you saw here, she
24 was handpicked by Meritage. All the salespeople they had, they
25 went and they handpicked this young woman. Six weeks ago they

1 had their lawyers meeting with this young woman.

2 Then, just before her testimony, they were sitting --
3 they were meeting with her. These lawyers were meeting with
4 Amy Fisher, and now they're ready to flush her away. They put
5 that young woman on the stand -- after meeting with her, sitting
6 down with her, talking to her, then they put her up here on the
7 stand.

8 This young woman worked there 12 years, and they
9 handpicked her. They put her on that stand. Their lawyers met
10 with her. They talked to her, and then they put her up here.

11 And what did Amy Fisher do? There's no question. She
12 wasn't honest with you. She was completely dishonest.

13 But Meritage put her on that stand. The only reason
14 she got on that stand and she said the things that she did was
15 because she was trying to support a ridiculous story that
16 Meritage came into this courtroom to tell you.

17 So she sat up there, and she said, "Sunday" -- just
18 two days ago Sunday -- "was a typical workday for me, my normal,
19 typical workday," and from then on she lied about everything,
20 what she did that day.

21 She told you, "I took three customers out to see
22 inventory homes." She told you their names, the addresses where
23 she took them, the inventory homes that she took them to see,
24 and she did all this because she was trying to support this
25 ridiculous story that Meritage wants you to believe.

1 So she sat up there saying all these things. "Oh, my
2 gosh. I had just a few pieces of traffic, and I was taking
3 people out and they were following me in my car. And I had my
4 car seat in the back, and so they followed me." I mean, a whole
5 story -- a whole fabricated story.

6 But we know what the truth is. You actually got to
7 see, for the first time, a real day in the life of a Meritage
8 salesperson. A real-world day, okay? You heard from Shelly
9 Schiebe, HP -- former HPD officer, 30 years. She does fraud
10 investigations.

11 You heard from her. She put Amy Fisher under
12 surveillance. We wanted to see what is a real -- what does a
13 real day look like.

14 She sat there, and she watched Amy Fisher go into that
15 model home at 11:54 a.m. Amy Fisher never left the entire day.
16 She stayed in that model home sales office the entire day, and
17 she didn't leave until 6:15 when it was time for her to go home.

18 She didn't leave. Her trainee assistant didn't leave.
19 They both were in that model home sales office the entire day,
20 and that's real world, and that's what really happens when
21 you're a Meritage home salesperson. You can sit if you want and
22 watch the surveillance tape. Her car doesn't move.

23 She doesn't go get in her car and go show anybody
24 anything. She doesn't go out with a big bag of tools that
25 nobody seems to have. She didn't do any of that. She sat in

1 that model home sales office because that's a typical day.

2 That's what they do. That's what this job is about.
3 And the sad thing is Meritage knew that, but they put that young
4 woman on the stand.

5 They put that young woman on the stand to support
6 their ridiculous story, and you saw her sitting up there. And
7 at the end of the day, after this HPD former officer, 30-year
8 veteran, fraud investigator has put her under surveillance,
9 called her out, shown her to be completely fabricating her whole
10 story, she had to come back in here. And that young woman that
11 Meritage put on the stand had to sit there and take the Fifth
12 Amendment to try to avoid incriminating herself on a possible
13 penalty of perjury.

14 That's what Meritage did. That's what they did.
15 Those are the lengths that they are willing to go to to support
16 a ridiculous, fabricated story. The day that we saw Sunday for
17 Amy Fisher, that is a typical day because this is an inside
18 sales position.

19 Please don't let Meritage get away with this. Don't
20 let them get away with this. We want you to do what's right.
21 This is an inside sales job, and what they did with Ms. Fisher
22 wasn't right.

23 It wasn't right. They had their lawyers meet with
24 her, put her up there knowing full well that this is an inside
25 sales job. It was not right.

1 What they're trying to do to Donna Armstrong, to Tim
2 Gonzalez, to David Lipnicki, it's not right. We're asking you
3 to do what's right. This is an inside sales job. Please tell
4 them that this is an inside sales job. Make them comply with
5 the law of how you're supposed to pay inside salespeople.

6 I thank you so much. I thank you for listening to
7 this case because this case is so important to these
8 salespeople. I appreciate your time and your attention, and we
9 are very hopeful that you-all are going to do the right thing
10 and not let Meritage get away with this. Thank you.

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12 *(End of requested transcript.)*

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14 I certify that the foregoing is a correct transcript
15 from the record of proceedings in the above matter.

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17 Date: July 30, 2015

18 /s/ Heather Alcaraz
19 Heather Alcaraz, RMR, FCRR
20 Official Court Reporter
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